IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible].

No. 107

UNITED STATES OF AMERICA,

vs.

ROSS R. BARNETT, Governor of the State of Mississippi, and PAUL B. JOHNSON, JR., Lieutenant Governor of the State of Mississippi.

PETITION FOR REHEARING

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INDEX

Table of Cases

TEXTS AND STATUTES

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INTRODUCTORY STATEMENT

Records disclose that as to Petitions for Rehearing it truly may be apt to paraphrase—many are filed but few are granted. However, the rules of this Court still provide office for such a Petition. Its importance is not to be underestimated, for history is as unsparing of this Court as of any other important institution when the brilliant light of hindsight records for the future. The Defendants respectfully submit that the opinion of the Court is not yet the perfect jewel which it ought to be. Hence we beg the Court's indulgence and careful consideration of this petition.

This petition is principally based on the content, meaning and procedural significance of Footnote 12 to the majority opinion. This note ended in the following language:

> "However, our cases have indicated that, *irrespective of the severity of the offense*, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. In view of the impending contempt hearing, *effective administration of justice* requires that this dictum be added: Some members of the Court are of the view that, *without regard to the seriousness of the offense*, punishment by summary trial without a jury would be *constitutionally* limited to that penalty provided for petty offenses."
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> (Emphasis in quotations is added.)

For brevity's sake, this quotation will be referred to hereinafter as Footnote 12.

I.

A Decision As to Jurisdiction Is Prerequisite to Any Other Determination Herein

This Court declared herein, *inter alia*, that there should be "effective judicial administration".[1] The Court of Appeals, after considering many issues, certified the question presented, pursuant to § 1254(3), Title 28, *U.S.C.* Appended thereto were the opinions of the eight judges on the Circuit Court. These opinions sharply present whether or not the Court of Appeals had jurisdiction to certify in manner and form as it did. If it be that the Court of Appeals was without jurisdiction to certify this question, then it is requisite that this Court finally dispose of this

1. Compare *New York Times* v. *Sullivan*, ... U.S. ....., 11 L. Ed. 2d 686. Furthermore, "Interest reipublicae ut sit finis litum". Broom's Legal Maxims, pp. 331, 343.

cause by discharging contemners or remand the cause to the District Court wherein it originated, as was done in *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16.[2]

As to jurisdiction, this Court has said[3]:

> ". . . but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it. . . ."[4]

If the Court of Appeals is without jurisdiction as to this case and on the re-trial the alleged contemners were convicted, they would be entitled, after such an ordeal, to have this Court establish on the subsequent appeal that the jury trial was but a sham. Under § 1254(3), Title 28, *U.S.C.*, the question certified certainly ought to be such as that the answer will be binding and controlling upon the Court of Appeals and not a shadow without substance.

With deference, we request that the Court be mindful of the chaos which would arise if there were to be a Court of Appeals trial, with or without a jury, and a conviction;

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2. See also *Shenandoah Broadcasting* v. *A.S.C.A.P.*, U.S. , 11 L. Ed. 2d 467, 469.

3. *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U.S. 379, 382.

4. Approved in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17.

and thereafter this Court should find that the exclusive right thus to punish was in the District Court. The schedules of this Court and the Court of Appeals demand that at least that modicum of construction accorded to statutory problems be accorded to the Court's decision here, so as to clarify the basic jurisdictional issue.[5]

Certainly this Court is in a better position to determine jurisdiction than is the Court of Appeals, which directed the bringing of the charges here.[6] *Effective judicial administration* requires that this Court determine jurisdiction *now* so that this case can be properly and effectively dealt with on the remand.

II.

The Court Erred in Its Application of the Petty Offense Analogy to the Case Before the Court

Two or more un-named members of the Court have expressed in Footnote 12 the hitherto unannounced view that a constitutional relationship exists between "petty offenses" and criminal contempts as exceptions to Article III, Section 2, Clause 3, and the 6th Amendment. We respectfully submit that such a view is completely logical and correct *if followed to its conclusion*. Such an analogy points the way to a meaningful and proper solution to a constitutional hiatus which has troubled this Court for many years.

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5. Cf. *Costello* v. *Immigration & Naturalization Service*, ___ U.S. ___, 11 L. Ed. 2d 559.

6. Cf. Mr. Justice Frankfurter's concurring opinion in *U. S.* v. *United Mine Workers*, 330 U.S. 258, 308, wherein he stated:

> ". . . No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide."

As the Federal Government has grown, the Executive Department has placed increasing responsibility on the judicial system, not only by the constant numerical expansion of laws which the courts are called on to enforce through regular processes but by providing for enforcement through injunctive proceedings in many new situations. Thus the work of the courts has grown both materially and in complexity. The simple contempts of colonial days, illustrated in the appendices to the opinions here, have been displaced in part by the more serious and far-reaching matters illustrated by the *United Mine Workers* case[7] and the present litigation. If constitutional limitations are to be evenly applied, then the same rules which have so long and successfully governed "petty offenses" may equally solve the problem of according criminal contempt procedures their constitutional due.

There is no authority to support the view that summary proceedings were ever available in "petty offense" cases as a matter of constitutional right "*irrespective of the severity of the offense*". The judicial history of the development of the petty offense exception to the Constitution is completely and clearly to the contrary.

In an article entitled "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury", 39 *Harv. L. Rev.* 917, Professors Frankfurter and Corcoran made extensive examinations into colonial legislation and court records. Their conclusions after this examination were:

> "The evidence has been summarized to indicate the common-law history of penal legislation which dispensed with the jury. Both in England and in the colonies a clear and unbroken practice—despite all uncertainties and reservations—emerges for two centuries preceding the Constitution. Many offenses were

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7. *Supra*, Note 6.

customarily tried solely by magistrates. These offenses were compendiously characterized as 'petty'. But pettiness was not a rigidly fixed conception; demarcation between resort to jury trial and its dispensation was not mechanical. In subjecting certain conduct to the summary procedure of magistrates, unguarded by the popular element, *there was an exercise of moral judgment dividing behavior into serious affairs and minor misdeeds.* The gravity of danger to the community from the misconduct largely guided the moral judgment; the wide repetition of the act, raising practical problems of enforcement, in part influenced the moral value which the community attached to the act. *The apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community's moral judgment upon it.* Broadly speaking, acts were dealt with summarily *which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light.* These general tendencies, both in England and in the colonies, represent the history absorbed by the Constitution . . . *We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not.*"

In the case of *Katz* v. *Eldredge*, 97 N.J.L. 123, 117 Atl. 841, Mr. Justice White, writing for the New Jersey Court, made the following remarks:

"'I think the real underlying historically established test *depends upon the character of the offence involved rather than upon the penalty imposed.* The offence must be a petty and trivial violation of regulations established under the police power of the state in order that the offender may be summarily tried, convicted, and punished without indictment by a grand jury and without trial by a petit jury. It must, of course, be assumed that the punishment for such a petty and trivial offence will also be comparatively petty and trivial, otherwise it would violate another

provision of the state constitution which prohibits cruel and unusual punishments. But, assuming that the punishment will bear proper relation to the seriousness of the offence, the theory, as I understand it, which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of *petty and trivial police power regulations* are more important than the *comparatively small prejudice to the individual* resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer. This, of course, is the converse of the rule with regard to *serious offences*, crimes and misdemeanors, where, for the preservation of the liberties of the people, the security afforded the individual by his right to trial by jury is more important than the mere convenience of the public arising from a speedy and inexpensive summary trial.'"

All of this Court's holdings on this subject are to the same effect.[8]

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8. In *Callan* v. *Wilson*, 127 U.S. 540, the Court considered an appeal from the Supreme Court of the District of Columbia on a Writ of Habeas Corpus. The petitioner was charged with conspiring to refuse to work as a musician in connection with an organizational dispute involving the Knights of Labor of America. The sentence imposed was a fine of $25.00 with a proviso that if default was made in its payment, petitioner was to be imprisoned for 30 days. No jury was accorded despite the petitioner's demand. This Court reversed the case. The first Mr. Justice Harlan, speaking for the Court, began its opinion thus:

> "It is contended by the appellant that the constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court.
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> * * *

Perhaps the most persuasive single case for the granting of the rehearing sought is *District of Columbia* v. *Colts*, 282 U.S. 63, where the defendant was charged with recklessly driving a motor vehicle at a greater rate of speed than 22 miles an hour and in such a manner and condition as to endanger property and individuals, which was a statutory offense that carried a petty first offense penalty of a $25.00 to $100.00 fine or a 10 to 30 day jail term. The Court, in a unanimous opinion by Mr. Justice Sutherland, adopted the same view expressed by the New Jersey Court in *Katz* v. *Eldredge, supra*. The Court stated:

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, *depends primarily upon the nature of the offense*. The offense here charged is not merely malum prohibitum, but in its very nature is malum in se."

The opinion concluded:

> "An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities

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"Without further reference to the authorities, and conceding that there is a class of *petty or minor offenses not usually embraced in public criminal statutes*, and not of the class or grade triable at common law by a jury, and which, if committed in this district, may, under the authority of Congress, be tried by the court and without a jury, we are of the opinion that the offense with which the appellant is charged does not belong to that class. A conspiracy such as is charged against him and his co-defendants is by no means a petty or trivial offense."

Next, in the case of *Natal* v. *Louisiana*, 139 U.S. 621, the court affirmed a non-jury proceeding in which Natal was convicted of violation of a New Orleans city ordinance related to the place of keeping a public market. The ordinance penalty was identical to the one involved in the *Callan* case.

In *Schick* v. *U. S.*, 195 U.S. 65, the court affirmed a summary conviction for violation of a minor provision of the United States act making it a misdemeanor to purchase or sell unbranded oleomargarine. The act provided for a maximum fine of $50.00.

> brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense . . . Such an act properly cannot be described otherwise than as a grave offense—a crime within the meaning of the third article of the Constitution—and as such within the constitutional guarantee of trial by jury."

In the cited case of *District of Columbia* v. *Clawans*, 300 U.S. 617, the Court demonstrated at the outset of its opinion that the offense there involved, namely, selling unused railway excursion tickets without a license, was at most but an infringement of local police regulations and was of a moral quality that was relatively inoffensive.

The rationale of the exhaustive research reflected in the law review article and the above decisions is that the Constitution intended, both by Article III, Section 2, Clause 3, and the 6th Amendment, to make it impossible for summary criminal proceedings to convict a citizen of a criminal offense which could stigmatize him with guilt of an offense contrary to the fundamental moral purposes of the community or which would endanger society.

The development of our society and its complicated interrelations of men, governments and the courts demand that this court *in this case* take a searching new look at what fundamental constitutional restrictions mean in the field of criminal contempt. It is no longer sufficient to justify the denial of that precious birthright of free men—trial by jury—by pointing to the pages of old reports, from another time and age involving an offense lightly regarded by community standards, the conviction of which was a matter of comparatively small prejudice to the individual.

Because of changed conditions, *those cases are no longer in point.*

Mr. Justice Goldberg's review of the increasing penalties imposed in criminal contempt cases[9] vividly demonstrates—not that courts are becoming unjust in punishments they mete out—but that the inherent nature of the offenses involved in many such cases is more severe. There are many present-day cases of criminal contempt which are not the trival or petty matters dealt with by the Common Law colonial courts.

If the criminal offense charged here consisted of failure to obey an order of a municipal court to keep off the grass, the limited analogy of Footnote 12 might be well taken. But the offense charged here is a much more grievous one. Here, we have the two men holding the highest positions of trust within a sovereign state, charged with a crime which could brand them as being felonious, with a corresponding discredit, not only to them as individuals, but to their State. Its unquestioned equivalent in statutory crime carries a penalty of one year's imprisonment and a fine of $1,000.00. Under the analogy which exists between the constitutionally required treatment of petty offenses and contempts of court, every precept of logic requires that the major substance of the analogy must also govern the court's decision—not solely the minor corollary thereof.

The Court, in this field of criminal contempt, has too long been bound by precedents of doubtful historicity and a hesitancy to make any rule which might lessen the "efficiency" of contempt procedures designed to obtain compliance with court orders. Summary *civil* contempt procedures, which are in nowise affected hereby, will ade-

9. See Section B, thereof and the cases cited therein.

quately prevent any breakdown of judicial authority and will eliminate any likelihood that an obstinate juror will thwart the will or decree of a court.

When history looks back at this opinion it should not write of it as a minor step in the direction of compliance with constitutional mandates, but that said should stand boldly forth as the point of departure from the rote of arbitrary denial of a basic constitutional right in cases of criminal contempt *"regardless of the seriousness of the offense"*.

III.

In View of the Doubt, Naturally Arising, Where Eight Judges Have Held Defendants Entitled to a Trial by Jury As a Matter of Right and Only Nine Judges Have Held to the Contrary, Judicial Discretion Indicates That a Jury Trial Should Be Granted

The members of this great Court, far better than we as lawyers, realize that the history of this case will stand as a voice forever sounding across the centuries as a part of the law of right and wrong. The importance of the principles of liberty and governmental relations here involved behooves the Court to now look back on what has happened and determine whether such retrospection gratifies the mind and soothes the conscience.

When the matter was before the Court of Appeals for determination, it was heard and decided by eight most able justices. Four of these members of the Court were of the opinion that under the Constitution and the law as written, the defendants are entitled to a trial by jury, and four were of the opinion that the defendants were not entitled to trial by jury *as a matter of right*. Hence, the question was certified here.

When the question was first considered by this Supreme Court, four of its eminent Judges were of the opinion that the defendants are entitled to a trial by jury, and five of its eminent Judges were of the opinion that defendants are not entitled to a trial by jury *as a matter of right*.

Seventeen jurists, skilled and learned in the law, showing by their diligence a sincerity made manifest by a mere reading of their written opinions, have studied and written upon this record. Eight of these minds have placed themselves on record as being of the opinion that these defendants are entitled to a trial by jury, while only nine have decided that the defendants here are not entitled to a trial by jury *as a matter of right*. Surely it must be conceded in the face of such record that the demand of these defendants to a trial by jury, as a matter of right, poses a serious question; in determining which, reasonable minds must and do differ.

But the facts of this case do not end there. There were among the five eminent Justices joining in the majority opinion, some who were of the opinion that if perchance the Court of Appeals, on remand, should by summary trial impose more than a trivial penalty on the defendants, then that action would in and of itself entitle the defendants to a trial by jury *as a matter of constitutional right*. In expressing this view the majority of this Honorable Court caused Footnote 12 to be added to their opinion.

Thus, retrospection reveals that eight Judges held the defendants to be entitled to a trial by jury as a matter of right without qualification, and nine held that the defendants are entitled to a trial by jury as a matter of right, in the event the Court of Appeals should require the imposition of a penalty in excess of that provided for petty offenses.

This Court has repeatedly held that Constitutional provisions for the security of persons and property are to be liberally construed, and it is the duty of the Courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachment thereon.[10]

Constitutional Rights of persons as contrasted with property rights occupy a preferred position,[11] and Constitutional guarantees of personal rights are to be largely and liberally construed in favor of the citizen.[12] The rules demand a liberal construction in favor of the citizen. Any doubt inherent in such a situation should surely come in at the window even if denied at the door. Uncertain ways are unsafe ways and doubt is a greater mischief than despair. Denial of a Constitutional right because of a doubt in the mind of one Justice out of seventeen as to the right of a citizen to its protection, is, we fear, a far cry from the protected so solemnly vouchsafed.

We are not unmindful that any six Justices constitute a quorum,[13] nor do we overlook the fact that a bare majority of the Justices is sufficient for the decision of cases. But when the decision of the question has become so close that a one-seventeenth majority determines it, we respectfully submit that such a record should give rise to a presumption of a right to the exercise of a judicial discretion. The grant of the right would be more requisite and ap-

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10. *Boyd* v. *U. S.*; 116 U.S. 616, 635; *Gouled* v. *U. S.*, 255 U.S. 304; *Byars* v. *United States*, 273 U.S. 28. Cf. also Mr. Justice Black's opinion here and the cases cited in Note 2 therein.

11. *Marsh* v. *State of Alabama*, 326 U.S. 501, 66 S. Ct. 276; *Hall et al.* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533.

12. *U. S.* v. *Commanding General*, 69 F. Supp. 661; *Gulf, Colorado & Sante Fe Ry. Co.* v. *Ellis*, 175 U.S. 150; 11 *Am. Jur.*, p. 670, §59, and numerous cases there cited.

13. Title 28, *U.S.C.* 1.

propriate than to close the eyes of the Court to the possible miscarriage of such a Constitutional guaranty and thus, by the authority of so small a majority, destroy it.

In this case, isn't it apropos for the Court to say that where such grave doubt exists judicial discretion should be exercised and a basic Constitutional guaranty liberally construed in favor of the citizen who invokes it?

The valid exercise of "judicial discretion" connotes the exercise of the reason and conscience of the Judge to affect a just result, taking account of the law *and the particular circumstances of the case.*[14] It is the power of the Court to determine questions on fair judicial consideration, with regard to what is right and equitable under law and circumstances and directed by reason and conscience to just result.[15] It is the equitable decision of what is just and proper under the circumstances.[16] As was said by Justice Stone in his dissenting opinion in *United States* v. *Butler*, 297 U.S. 1:

> "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

The narrow compass of human wisdom and the cases recorded in the books, do not and cannot embrace all of the possible situations that may arise. Hence cases never before considered, such as the case at bar, often present themselves and will continue to do so. For these, we sub-

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14. *Brandon* v. *Board of Commissioners*, 124 N.J.L. 135, 11 A.2d 304, 311.

15. *Schneider* v. *Hawkins*, 179 Md. 21, 16 A.2d 861, 864.

16. *Nielson* v. *Superior Court for Thurston County*, 7 Wash. 2d 562, 110 P.2d 645, 647.

mit with deference, the decision must be according to discretion and conscience—not according to the hard, strict letter of the law but according to a generous and sympathetic feel of all of the circumstances in the light of things germane to the experiences of mankind collectively, and the sanctity of Constitutional rights.

History looks over the shoulder of the Court, and freedom stands with bated breath as it listens for its answer. Justice and equity stand in awe lest this great Court fail to render to these defendants their fullest due by extending to them that recognition of the key to justice, known to the law as "Judicial Discretion", and made available to the Court out of the experiences of mankind for the express purpose of enabling the Court to do what is right and equitable under the law and the circumstances and directed by reason and conscience, but which is not and cannot be governed by any fixed principles or rules.[17]

IV.

If Left Standing Unclarified, the Optional Procedure Demanded by the Court's Dictum Deprives the Defendants in This Case of Due Process of Law

Due process has come to mean that both the procedure followed and the substance of a thing done by the United States which deprives a person of life, liberty or property must accord with a community-wide sense of fair play.[18] Most often the yardstick of due process is used to admeasure the constitutional validity of legislative enactments or exercise of executive police authority, but its applicability

17. *Rowley* v. *Beuthuysen*, 16 Wend. (N.Y.) 369, 378.

18. *Galvan* v. *Press*, 347 U.S. 522; *Breithaupt* v. *Abram*, 352 U.S. 432. Cf. Corwin's, *The Constitution of the United States*, p. 844, *et seq.*

to judicial proceedings has long been engrained in the decisional law of this court.[19]

By Footnote 12, the Court of Appeals is admonished that a majority of the judges of this Court have determined that the Constitution requires that only the punishment applicable to petty offenses can be meted out to these defendants if they are convicted, where their trial proceeds contrary to the demands of the 6th Amendment and Article III, Section 2, Clause 3.

But when is appropriate punishment to be determined? Does the dictum contemplate that the trial would be commenced before a constitutional jury, proof taken and at the conclusion thereof the judges could then determine to discharge the jury and inflict petty offense punishment? Could the court proceed without a jury and, having heard the evidence, make a determination that the offense was proven to the court's satisfaction but that the appropriate degree of punishment transcended that permitted for petty offenses and then, after an obvious determination of guilt, start the proceedings anew with a jury present? If the Constitution is thought to require a jury, is the jury to be chosen from the vicinage of the district where the alleged offense was committed, as the 6th Amendment requires?[20] Effective judicial administration connotes neither doubt nor darkness but certainty and light.

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19. *Pennoyer* v. *Neff*, 95 U.S. 714, 733.

20. Indeed it might even be asked if the question of appropriate punishment is any longer an open one insofar as the Court of Appeals and these defendants in this case are concerned, in the light of the severe sanctions previously imposed in this same case, especially when it is considered that the Court imposed both fines and imprisonment upon the defendants. Cf. 18 *U.S.C.A.* 401, and *In re Bradley*, 318 U.S. 50.

We respectfully submit that the lack of a clear answer to the foregoing questions leaves this case in a posture of vagueness as to the procedural due of the defendants here, which violates the guarantees of the 5th Amendment. The court has recently spoken in a meaningful way of an analogous problem. In the case of *Cramp* v. *Board of Public Institutions of Orange County, Fla.*, 368 U.S. 278, the court refused to permit Cramp to be discharged as a public school teacher because of his refusal to execute a non-communist oath. In the course of its opinion, the court stated:

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L. Ed. 200. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 243, 52 S. Ct. 559, 568, 76 L. Ed. 1062."

The fact that the Circuit Court of Appeals below might declare it would irrevocably commit itself to the selection of one option or the other in advance of this particular trial, so as to avoid impermissible vagueness, would not cure the error inherent in the court's requirement.[21]

No critical appraisal of the conduct with which the defendants stand charged can obscure their right to demand constitutional clarity in the procedures to be followed. In the case of *Chessman* v. *Teets*, 354 U.S. 156, this court, *after denying certiorari on five previous occasions*, stated:

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

We respectfully submit that the Constitution requires that the offense charged to constitute a criminal contempt, and not the resultant appropriate punishment which prop-

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21. Cf. *Lanzetta et al.* v. *State of New Jersey*, 306 U.S. 451.

erly can only be determined *after* a conviction, must be held to control the defendants' constitutional right or lack of it to a jury trial of the charges made by the Court below.

CONCLUSION

For each and all of the reasons set out aforesaid, the Court should grant this petition and upon a rehearing hereof should (a) declare that the exclusive jurisdiction of this cause is in the District Court of the District where the alleged contemptuous acts were committed, and (b) require that this case proceed only by way of a trial by a constitutionally composed jury through the exercise of judicial discretion or as of right.

Respectfully submitted,

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semblies never broached the subject so far as we can determine.

Mr. Justice Black characterizes summary criminal contempt power thus:

> "Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of *not unwilling judges*, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society."

Lord Chesterfield reflected the knowledge and judgment of many a common man when he said, "There are misers of money but none of power." With deference, Defendants suggest that if "Justice must satisfy the appearance of justice,"[23] our judicial system would be better off if it exercised this "necessity" along lines which more clearly avoid the appearance of injustice, wherever possible, and that indirect contempt such as here alleged, which are the subject statutorily defined crimes, present such a possibility.

Since the date of the *Green* case, several Law Journals have carried articles discussing the status of criminal contempt procedures. The most elaborate of these articles is entitled, "The Constitution and Contempt of Court" by Ronald Goldfarb.[24] Perhaps Mr. Goldfarb's views can be best summarized by this paragraph from his articles:

> "When a man is deprived of his property or liberty as punishment for commission or omission of an act which is proscribed by society, for whatever reason, he

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23. *Offutt* v. *U. S.*, 348 U.S. 11.

24. 61 *Michigan L. Rev.* 283 (Dec. 1962).

> is treated as a criminal. In contempt cases there are no reasons strong enough to override the long and well-established policies guaranteeing the right to be tried by a jury, after indictment, and in the ordinary course of the law. The Constitution is quite clear in its directives in this respect. The policies involved go to support, at least in comparative value, the Constitution's implications."

The prosecution here urges this court to cleave to "the *traditional* law of contempt." What a startling position for a government of limited powers to take! How can they forget to *insist* that this court is bound to follow only the *Constitutional* law of contempt?

Should a determination to see these defendants punished with "efficiency" and free from the "hazard" of acquittal prevail over constitutional restraints, the words of the Chief Justice of the United States in his dissent in *Brown v. United States*,[25] concerning a failure to follow the minimum procedural requirements of Rule 42(b), may become even more prophetic.

> "Unfortunately, the failure to adhere to procedural regularity may be glossed over in the investigation of matters of burning public interest, but it should be remembered that the deprivation of the rights of a witness in such an investigation must apply as a precedent to people in all walks of life, both good and bad. I suggest that the full import of the decision in this case will not be recognized until it is applied at some future time in other types of investigations and to other people."

Certainly no better conclusion could be written to this point than in the very words of Mr. Justice Black.

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25. 359 U.S. 41, 63.

"The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. • • •

"In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is concerned. There is not valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. *Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth.* In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt."

D

The Ninth and Tenth Amendments Prohibit Any Implied Delegation of Power to Federal Courts to Punish Criminal Contempt Without a Constitutional Trial by Jury

This Court has often held that the Union emanated from the people.[1]

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1. *McCullough v. Maryland*, 4 Wheat. 316, 404, 5.

"The government of the Union then is emphatically and truly a government of the people. In form and in substance

After the Constitution recited that "the trial of all Crimes, except in *Cases of Impeachment*, shall be by jury," and "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," the people insisted on stating: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[2] Wherein is to be found a conveyance by the people of power to criminally punish any citizen without a jury trial, *except in "Cases of impeachment"?*

E

The Observance of Constitutional Safeguards in Criminal Contempt Is Becoming Increasingly Important

A former Chief Justice of the United States, Melville Fuller of Illinois, before he became head of the bench, remarked of a reforming member of the Chicago Bar: "Brother B would codify all laws in an act of two sections: 1st, all people must be good; 2nd, Courts of Equity are hereby given full power and authority to enforce the provisions of this act."

Query: Is this ridiculous and implausible?

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it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. This government is acknowledged by all to be one of enumerated powers."

Martin v. *Hunters Lessee*, 1 Wheat. 304, 324.

"The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically as the preamble declares, by 'the people of the U. S.'"

2. 9th Amendment. The 10th Amendment is as express a retention of undelegated powers as the 9th. "The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people." (See Appendix, p. A1.)

Answer: There are now at least 29 instances in which Congress has authorized Courts of Equity to restrain legislatively declared public wrongs.[1]

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1. Antitrust laws, restraining violation (by U. S. attorney, under direction Attorney General) (15 U.S.C. 4).

Associations engaged in catching and marketing aquatic products restrained from violating order to cease and desist monopolizing trade (by Department of Justice) (15 U.S.C. 522).

Association of producers of agricultural products from restraining trade (by Department of Justice) (7 U.S.C. 292).

Atomic Energy Act, enjoining violation of act or regulation (by Atomic Energy Commission) (by Attorney General) (42 U.S.C. 1816).

Bridges over navigable waters, injunction to enforce removal of bridge violating act as to alteration of bridges (by Attorney General) (33 U.S.C. 519).

Civil Rights Act of 1957 (by Attorney General) (42 U.S.C. 1971).

Clayton Act, violation of enjoined (U. S. attorney, under direction of Attorney General) (15 U.S.C. 25).

Electric utility companies, compliance with law enforced by injunctions (by Federal Power Commission) (16 U.S.C. 825m).

False advertisements, dissemination enjoined (by Federal Trade Commission) (15 U.S.C. 53).

Freight forwarders, enforcement of laws, orders, rules, etc., by injunctions (by Interstate Commerce Commission or Attorney General) (49 U.S.C. 1017).

Fur Products Labeling Act, to enjoin violation (by Federal Trade Commission) (15 U.S.C. 69g).

Enclosure of public lands, enjoining violation (by U. S. attorney) (43 U.S.C. 1062).

Investment advisers, violations of statute, rules and regulations governing, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80b-9).

Gross misconduct or gross abuse of trust by investment companies, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-35).

Use of misleading name or title by investment company, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-34).

F
Conclusion

With deference, we submit, the time has come and now is when this Court should make the searching reappraisal of these "boundless expedients" called for by the Constitutional dissent in *Green*. *Constitutional precepts*

Violation of statute governing, or rules, regulations, or orders of SEC by investment companies, enjoined (by Securities and Exchange Commission) (15 U.S.C. 80a-41).

Fair Labor Standards Act, enjoining of violations (by Administrator, Wage and Hour Division, Department of Labor, under direction of Attorney General, see 29 U.S.C. (204b)) (29 U.S.C. 216 (c), 217).

Longshoremen's and Harbor Workers' Compensation Act, enforcement of order by injunction (by United States attorney, see 20 U.S.C. 921a) (33 U.S.C. 921).

Import trade, prevention of restraint by injunction (by United States attorney, under direction of Attorney General) (15 U.S.C. 9).

Wool products, enjoining violation of labeling act (by Federal Trade Commission) (15 U.S.C. 68e).

Securities Act, actions to restrain violations (by Securities and Exchange Commission) (15 U.S.C. 77t).

Securities Exchange Act, restraint of violations (by Securities and Exchange Commission) (15 U.S.C. 78u).

Stockyards, injunction to enforce order of Secretary of Agriculture (by Attorney General). (7 U.S.C. 216).

Submarine cables, to enjoin landing or operation (by the United States) (47 U.S.C. 36).

Sugar quota, to restrain violations (by United States attorney under direction of Attorney General, see 7 U.S.C. 608 (7)) (7 U.S.C. 608a-6).

Water carriers in interstate and foreign commerce, injunctions for violations of orders of ICC (by ICC or Attorney General) (49 U.S.C. 916).

Flammable Fabrics Act, to enjoin violations (by Federal Trade Commission) (15 U.S.C. 1195).

National Housing Act, injunction against violation (by Attorney General) (12 U.S.C. 1731b).

demand observance not temporization. If this is not done, we could one day find, as counsel for Eugene Debs speculated, a court injunction being read to halt an advancing army of irate citizens. Certainly, every man longs to live with a sense of security in a rational freedom, in a nation where laws are dictated by the common weal and obeyed by common consent. *Judicial review has survived because it articulates a decent respect for the opinions of mankind.* This is the very essence of the rule of law. History and common sense teach that the public's respect for the Judiciary has never been enhanced by its "efficiency", but only by its Judges knowing Justice, and her blind.

POINT II

Defendants Are Entitled to a Trial by Jury under the Statutes of the United States

A

The Pertinent Statutes, 18 U.S.C., Sec. 402, and Sec. 3691, Plainly Grant to the Defendants the Right of Trial by Jury

After the remand of the Meredith case to the District Court, the Court of Appeals recalled its mandate then directed the District Court to grant all relief prayed for and to issue a permanent mandatory injunction enjoining the admission of Meredith to the University. At the same time and in the same order the Court of Appeals issued its own injunction of identical effect.

On September 13, 1962, the District Court issued its injunction incorporating the mandate of the Court of Appeals and all of the terms of the injunction of that Court.

Both the injunction issued by the Court of Appeals and the injunction issued by the District Court being

identical in their terms, a violation or disobedience of the one must necessarily be a violation of the other. Hence, the actions charged against the defendants, if true, were in disobedience of the Writ of the United States District Court as well as the Writ of the Court of Appeals and necessarily would fall within the provisions of Rule 42 (b) of the Rules of Criminal Procedure and Sections 402 and 3691, the pertinent parts of which are set out in the margin.[1]

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1. Rule 42 (b), *Rules of Criminal Procedure:*

The defendant is entitled to a trial by jury in any case in which an act of Congress so provides.

Section 402, Title 18, *U.S.C.*

Sec. 402. Contempts constituting crimes.

"Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States *or any court of the District of Columbia*, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Section 3691, Title 18, *U.S.C.*

"Sec. 3691. Jury trial of criminal contempts.

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States."

Section 402 provides that it applies to any person wilfully disobeying any lawful order "of any district court of the United States *or any Court of the District of Columbia* * * *"

Nine Circuit Courts of Appeal were established on March 3, 1891.[2] The Court of Appeals for the District of Columbia was established as an Appellate Court in the District of Columbia on February 9, 1893.[3] On March 3, 1911, Congress continued the existence of nine Circuit Courts of Appeal and did not expressly include the Court of Appeals of the District of Columbia as one of them.[4] However, on March 19, 1928, the United States Supreme Court, in *Swift & Co. et al.* v. *U. S.*[5] held that the Court of Appeals of the District of Columbia was a Circuit Court of Appeals. Then in 1940 Congress passed an Act[6] providing:

> "For the purposes of Secs. 17-23 of this Title the District of Columbia shall be deemed to be a judicial Circuit",

and on June 25, 1948, it passed[7] an Act affirmatively establishing the Court of Appeals of the District of Columbia as a Court of Appeals of the United States.

The Clayton Act was enacted on October 13, 1914. Its Section 21 was almost identical to the first paragraph of 18 *U.S.C.* 402.[8]

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2. 26 Stat. 826.
3. 27 Stat. 434.
4. 36 Stat. 1131.
5. 276 U.S. 311. See also Historical and Revision Notes, 28 *U.S.C.*, § 41, pp. 314, 5.
6. Title 28, U.S.C.A. § 17 (1940 edition).
7. 62 Stat. 870.
8. "That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court

Section 23 of this Act made the disobedience of any lawful Writ of any District Court of the United States or any Court of the District of Columbia triable by a jury, upon demand of the accused.[9]

When the Clayton Act was passed on October 15, 1914, the Court of Appeals of the District of Columbia was not specifically declared to be one of the nine United States Courts of Appeal, but it became such a regular Court of Appeals upon being so declared by the Supreme Court in *Swift & Company et al.* v. *U. S.*,[10] on March 19, 1928, upon being incorporated in the regulatory acts of Congress in 1940 by §17, and on June 25, 1948, by affirmative Act of Congress.

On June 25, 1948, when 18 U.S.C., §402, was made the law, there was in existence a Court of Appeals in the District of Columbia of the same timber, powers, and jurisdiction as the Court of Appeals of the Fifth Circuit, which former Court had been so recognized for more than 20 years by decision and for more than eight years by implicit statutory declaration.

While Section 3691 provides for disobedience of writs of a District Court only, Section 402 creates the *substantive* jurisdictional law governing trials for contempt. Hence,

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of the United States *or any court of the District of Columbia* by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided." 38 Stat. 730.

9. "In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."

10. *Supra*, p. 40.

it is not important that Section 3691 provides as to trials of contempt of District Court orders alone, because Section 3691 is referred to solely to establish the procedural machinery for the trial, it does not grant the substantive right of trial by jury in this case.

If an act was a wilful violation of any Court order of the District of Columbia between private litigants and said act was a violation also of a statute of the United States it would beyond dispute be triable before a jury. If it would be triable before a jury if it had occurred in the District of Columbia, the American standard of justice and fair play will not permit a person to be denied a jury trial for disobedience of an order of the Court of Appeals for the Fifth Circuit. This would be the most manifest of discriminations.

The Court has construed the due process clause of the 14th Amendment to prohibit discrimination by states in the field of property taxation;[11] discrimination by states in the exercise of police power between billboard and newspaper advertising;[12] discrimination among milk dealers;[13] and in many other cases.

The due process provisions of the 5th Amendment are binding on the United States just as the provisions of the 14th Amendment are binding on the States.[14] Relying upon statutory public policy and its supervisory authority over Federal Courts, this Court has reached results under the due process clause of the Fifth Amendment similar to those arrived at under the equal protection clause of the Fourteenth Amendment in refusing to enforce dis-

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11. *Bells Gap. R. Co. v. Pennsylvania*, 134 U.S. 232, 237.

12. *Packer Corp. v. Utah*, 285 U.S. 105.

13. *Mayflower Farms v. Ten Eyck*, 297 U.S. 266.

14. *Scott v. Sandford*, 19 How. 393, 450.

criminatory restrictive covenants in the District of Columbia;[15] in reversing a judgment of a Federal District Court because of discriminatory exclusion of day laborers from the jury panel;[16] and in construing the railway labor act to require a collective bargaining representative to act for the benefit of all members of the craft without discrimination on account of race.[17]

To construe Section 402 to provide for a trial by jury for the disobedience of a Writ of the Court of Appeals in the District of Columbia and to deny a trial by jury for the disobedience of a like Writ of the Court of Appeals for the Fifth Circuit under identical circumstances would be equally a discrimination.

If the "threatened" acts of these defendants were prospective disobediences of the Writ of the Court of Appeals, they would also be identical disobediences of the identical Writ of the District Court. Yet, neither the private litigant nor the *amicus* filed any proceedings in the District Court where, on demand by defendants, a jury trial was mandatory. The *amicus* instead went to the Court of Appeals and thereby claims to have achieved a complete, twice-reinforced denial of the right of defendants to a jury trial. The prosecution should not be held to have the choice to thus deprive these defendants of a right to a jury trial for the same identical alleged offense by the subterfuge of bypassing the District Court and applying to the Court of Appeals for relief of an original nature in a court of purely appellate jurisdiction or by unlawfully intervening in private litigation. However, we feel sure this Court

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15. *Hurd* v. *Hodge*, 334 U.S. 24.

16. *Thiel* v. *So. Pac. Co.*, 328 U.S. 217.

17. *Steele* v. *L. & N. R. Co.*, 323 U.S. 192.
Cf. *Griffin* v. *Illinois*, *supra*, p. 15.

will not permit these defendants to be so discriminated against and their right to a jury trial under Section 402 to be taken from them by any such construction of the facts here presented.

The spirit and meaning of the law is written into Article IV, Section II of the Constitution.[18] In *Scott* v. *Sanford*,[19] it was held that this clause is a guaranty to the citizens of the different states of equal protection by Congress and binding on the National Government.

But the amicus argues that the Clayton Act referred only to District Courts and supports his argument by quoting from the Congressional record a statement made by Mr. Clayton on July 9, 1912. The amicus loses sight of the fact that this same Congressional Record[20] sets out the bill then being considered.[21]

That act did not pass. It was 2 years and 3 months later, October 15, 1914, that a new and different Clayton Act was introduced and to it had been added the language now found in Section 402, viz:

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18. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

19. *Supra*, p. 42.

20. 48 Cong. Rec. 8801.

21. In material part it read:

"Section 268 a. That any person who shall willfully disobey any lawful writ, process, order, rule, decree or command of any *District Court of the United States* by doing any act or thing therein or thereby forbidden to be done by him be of such character as to constitute also a criminal offense under any statute of the United States or at common law, shall be proceeded against for his said contempt as hereinafter provided.

"Section 268 b. * * * In all cases within the purview of this act such trial may be had by the Court, or, upon demand of the accused, by a jury * * *."

"* * * writ, process, order rule, decree or command of any District Court of the United States *or any Court of the District of Columbia.*"

To argue that the Congress in 1948 stating in Section 402

"or any Court of the District of Columbia"

did not know that the language embraced the then existent Court of Appeals of the District of Columbia is nothing short of folly.

"Any Court of the District of Columbia" includes of necessity all of the Courts of the District of Columbia.

To argue that Section 402 does not apply to the Court of Appeals is to strike from the statute its very language. To say that the statute does not apply to the Court of Appeals for the Fifth Circuit is to grant an accused in the District of Columbia a right of trial by jury and to deny to an accused in the Court of Appeals, Fifth Circuit, a right of trial by jury. Such a discrimination violates the rights against discrimination guaranteed by Article IV, Section II, and the Fifth Amendment.[22]

B

The Action in Which the Charges Were Brought Is Not an Action Brought or Prosecuted by the United States

The prosecution argues that the Court of Appeals' order of September 18, 1962,[1] authorized it to appear in an appellate court and bring or commence an original proceeding between it and the Defendants. It argues that it

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22. Cf. *Cranch* v. *Nevada*, 6 Wall. 35.

1. (C. 5.)

was "something more than an amicus", whatever that means. This argument is without merit.

This unique order was entitled "No. 19475, *James H. Meredith, Appellant* v. *Charles Dickson Fair, et al., Appellees*", a suit between private persons, and was filed in that suit—no other suit was then pending. In addition, the order itself shows that the authority of the United States to appear was limited by the language of the order only "to appear and participate as *amicus curiae in all proceedings in this Court* * * * and * * * *also before the District Court of the Southern District of Mississippi* * * *."

This voluntary entry of the United States is not authorized by any act of Congress and none is claimed by the Government.[2] Congress has not authorized the Government to enter any case such as this as a litigant and the Government does not contend otherwise. The claimed entry by the United States under the order of September 18, 1962, should not be confused with its commencement of this criminal proceeding by filing its information of December 21, 1962. The filing of the information for contempt was necessarily predicated on the alleged jurisdiction of the Court of Appeals to enter the order of September 18, 1962, authorizing the United States "to appear and participate as *amicus curiae* in all proceedings *in this action*[3] before this Court."

"This action" was brought and prosecuted by Meredith, in the name of Meredith and on behalf of Meredith. It was not brought or prosecuted by, or in the name of or on behalf of the United States.

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2. Cf. Judge Cameron's opinion. (C. 88.)

3. *James H. Meredith* v. *Charles Dickson Fair et al.*, No. 19475.

It is clear from the statute[4] that the words "brought or prosecuted in the name of, or on behalf of the United States," do not refer back to or modify the word "contempt" but clearly modify "*suit or action* brought by or prosecuted in the name of or on behalf of the United States" and which the writ, process, order, decree or command was "*entered.*"

"Brought", used in connection with a suit, means instituted, commenced. Such was long ago decided in *Berger* v. *Douglas Co. Commissioners*[5] where it was said:

> "These facts present a question of some doubt as to whether the suit was 'brought'—that is, instituted, commenced—in the district court; and if it was not, it was not removable."

In *Goldenberg* v. *Murphy*,[6] this Court held:

> "A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought'. In this connection the two words evidently mean the same thing and are used interchangeably."

Clearly the action in which the temporary restraining order and the permanent injunction were "entered" was not "brought" or "commenced" by the United States as defined in *Goldenberg* v. *Murphy, supra.*

It is well established law that the United States may appear as a litigant only when authorized to do so by

4. 18 U.S.C. 3691.

5. 5 Fed. 23, 26.

6. 108 U.S. 162.

Congress; and may invoke the jurisdiction of the Courts as plaintiff only through authorized persons.

Congress, in the passage of the "Civil Rights" Act of 1960, affirmed its knowledge that neither the United States nor the Attorney General had any right to institute any action for the United States or in the name of the United States for relief of anyone claiming to have been deprived of his right to vote because of his race, without express statutory authorization by enacting Section 1971(c) of Title 42, U.S.C.,[7] in order to establish such right pursuant to the Fifteenth Amendment in the limited field of voting rights there covered.[8]

Such a construction is not unique in the law. This Court has many times affirmed in a variety of situations that the word "person", without more, in a statute does not include the Sovereign.[9]

There is no statute authorizing the United States to bring or prosecute an action to enjoin the officials of the State or the officials of the University of Mississippi to admit James H. Meredith as a student thereat. In the absence of such statute the United States could not bring or maintain such action for injunction. Their claim to have acted in a governmental capacity is as spurious

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7. 74 Stat. 90.

8. *U. S.* v. *Alabama*, 171 F. Supp. 720, 729, 267 F.2d 808 (Reversed on other grounds after this subsequent enactment of Congress, 363 U.S. 602).

9. As to Norris LaGuardia Act, *United States* v. *United Mine Works*, 330 U.S. 258;

As to Shermah Act, *United States* v. *Cooper Corp.*, 312 U.S. 600, 604;

As to a Municipal Corporation under the "Civil Rights" Act, *Monroe* v. *Pope*, 365 U.S. 167.

Cf. *Hague* v. *C.I.O.*, 307 U.S. 496, 514.

here as it would be if they went back into the business of strike breaking as they did in *Debs* despite the plain prohibition of statutes there.

It is therefore apparent, not only that the writ of injunction that is herein charged to have been disobeyed was not "brought or prosecuted in the name of or on behalf of the United States", but also equally apparent that, in the absence of a statute authorizing the bringing of such an action by the United States, any action brought for such an injunction could not be "brought or prosecuted in the name of or on behalf of the United States". Of course, there is no such statute authorizing the bringing or prosecution of such a suit by the United States.[10]

This Court has held in *Michaelson* v. *United States*,[11] that where the act charged as contempt constitutes a crime

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10. The prosecution has paid little heed to proper procedure elsewhere in this action. In fact, this prosecution was void in its inception because of the improper procedure followed in its origination. An action for criminal contempt could not lawfully be commenced as a part of No. 19475, styled *"James H. Meredith v. Charles Dickson Fair et al."* Such a criminal action could only be commenced under an action styled *"United States v. Ross R. Barnett et al.,"* or *"In re Ross R. Barnett et al."* However, here the prosecution attempted to commence this proceeding by filing its information of criminal contempt in a civil action (No. 19475) styled as a civil action—*"Meredith v. Fair et al."*

In *Gompers* v. *United States*, 233 U.S. 604, this Court ruled:

> "In the first place the petition was not entitled 'United States v. Samuel Gompers et al.' or 'In re Samuel Gompers et al.,' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, . . . He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. . . ."

11. 266 U.S. 42.

the right to trial by jury is mandatory. Hence, we say that the Defendants are entitled to a trial by jury in Jackson, Mississippi, under the provisions of Rule 18 of the Federal Rules of Criminal Procedure.

C

The United States Does Not Have an Option under the Statutes to Choose to Deny Defendants a Right to Trial by Jury

The Government admits that if this matter were before a District Court and if it were an order in an action which was not brought or prosecuted in the name of or on behalf of the United States, the defendants would be entitled to be tried by a jury as a matter of statutory right. We beg the Court then, to consider the following matters:

(1) The facts show that from beginning to end *Meredith* v. *Fair* was a civil law suit seeking personal redress for a claimed violation of the constitutional rights of an individual citizen. Congress has many times denied to the United States the requested right to bring such litigation, and the Justice Department is indeed now urging the Congress to vest it with such jurisdiction.

(2) At all times during this private litigation, Meredith was represented by competent and vigorous counsel who sought all possible orders to achieve Meredith's claimed and adjudicated personal rights. No substantial action was taken by the United States which was not promptly or had not been previously duplicated by the private litigant.

(3) The U. S. District Court acted promptly and correctly on every request made to it for action by the private litigant and by the prosecution, then acting in the guise of an "amicus curiae". Every assertion by the prosecution contrary to this state-

ment is both dehors the record in context and false in fact.

In matters of basic constitutional and statutory protection this court regards substance over form.[1] If the prosecution had not moved for a cumulative injunction and done so in an appellate court instead of allowing the private litigant to proceed in a court vested with statutory original jurisdiction, the specific provisions of 18 U.S.C. 402 would have pointedly settled the issue now before this Court. In the light of these matters, we submit the question certified could well be re-phrased in this manner:

> Can the United States deprive a person of a constitutional protection provided by Congress by intervening in private litigation, by by-passing of a District Court and requesting injunctive relief from a Court of Appeals?

With it thus phrased, the answer is obvious. When this Court looks to substance and not to form, it may readily see that this is precisely what happened in this very proceeding.

POINT III

An Affirmative Answer to the Question Certified Should Include a Direction Requiring the Court of Appeals to Certify This Case for Trial in the Appropriate District Court

The record in this case shows that the prosecution was not required to file their application for criminal con-

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1. *Weiss* v. *Stearns*, 256 U.S. 242, 254.

> ". . . when applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder, we must regard matters of substance and not mere form."

Cf. Gommillion v. *Lightfoot*, 364 U.S. 339.

tempt citation of Defendants in the Court of Appeals. The order did positively require the prosecution to proceed in accordance with Rule 42(b). This rule is exclusively a District Court rule.

In Title 18, U.S.C., §3771,[1] the Congress permitted this Court to make rules of practice *in the District Courts* covering proceedings "*prior* to and including verdict, or finding of guilty or not guilty". The only part of the Federal Rules of Criminal Procedure which relate to Courts of Appeal are those which are applicable to proceedings "*after* verdict or finding of guilt".[2] Thus, the Court's requirement of proceeding in accordance with Rule 42(b) was for a proceeding in a District Court.

We would further note that the order of November 15, 1962, contemplated a proceeding by the prosecution which would afford the Defendants "maximum procedural protection". Yet, the effect of the prosecution's proceeding before the Court of Appeals was the denial of a fundamental procedural protection to Defendants; namely, the *right* to have the proceedings reviewed by an appellate court. By originating this proceeding in the Court of Appeals, the Defendants are left only with the *privilege* of petitioning this Court for a *discretionary* review.

Since this Court has consistently held that the accused in a contempt proceeding is entitled to an impartial arbiter of fact[3] for the trial of alleged criminal contempt, it would certainly be most seemly and proper for this cause to be heard before a District Court having the proper venue, as required by the criminal rules.[4] Original jurisdiction

1. 73 Stat. 11.
2. 18 U.S.C., § 3772; 73 Stat. 11.
3. *In re Murchison*, *supra*, p. 17.
4. Rule 18.

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to hear and determine criminal offenses is vested exclusively in such District Courts.[5] The transfer of a contempt case to another court for trial is not without precedent.[6]

Such a certification to a District Court would most assuredly comport with sound judicial administration since such District Courts are best equipped to conduct such hearings. They already have ~~allies~~ and jury commissioners as well as the physical facilities of a trial courtroom in the district where the criminal act was allegedly committed. Most fundamentally, the remand to such a District Court best comports with the meaning and intent of the Constitution.[7]

CONCLUSION

Our civilization has decided, and justly so, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter. It takes its inquiry to men who do not know the law, but who must rely on their feel of things germane to the experiences of man collectively. When there is a library to be catalogued, a solar system to be discovered or a space ship to be placed in orbit, or any trifle of that kind, civilization seeks out its specialists and its experts. But, when it would discharge Liberty's vital business of determining the guilt or innocence of a human being charged with a violation of the law that could deprive him of his liberty, it collects twelve ordi-

5. 18 U.S.C. 3231; 62 Stat. 826.

6. *Houston & N. Tex. Motor Freight Lines, Inc.*, v. *Local 745, Int. Bro. Teamsters, etc., et al., supra*, p. 18.

7. Article III, Section 2, Clause 3, and the 6th Amendment.

nary men going about their usual avocations the same as was done by the founder of Christianity.

Respectfully submitted,

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APPENDIX

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The Constitution of the United States:

The 8th Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unsual punishments inflicted."

The 9th Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained *by the people.*"

The 10th Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or *to the people.*"

United States Code Annotated, Title 18, Section 3285:

§ 3285. Criminal Contempt.

No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act. June 25, 1948, c. 645, 62 Stat. 828.

United States Code Annotated, Title 18, Section 3692:

§ 3692. Jury trial for contempt in labor dispute cases.

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall en-

joy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehaviour, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

United States Code Annotated, Title 18, Section 3771:

§ 3771. Procedure to and including verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice and procedure with respect to any or all proceedings *prior to and including verdict, or finding of guilty or not guilty* by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States commissioners.

United States Code Annotated, Title 18, Section 3772:

§ 3772. Procedure after verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings *after verdict, or finding of guilt* by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States

Justice Black's dissent in Green v. U. S., 356 U.S., pp. 193-219:

MR. JUSTICE BLACK with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law.[1] In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, "perhaps, nearest akin to despotic power of any power existing under our form of government."[2] Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society. Therefore to me this case involved basic questions of the highest importanee far transcending its particular facts. But the specific facts do provide a striking example of how the great procedural safeguards erected by the Bill of Rights

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1. The term "summary proceeding" (or "summary trial") is ured in its ordinary sense to refer to a "form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury." 3 Bouvier's Law Dictionary (8th ed. 1914) 3182. Of course as the law now stands contempts committed in the presence of the judge may be punished without any hearing or trial at all, summary or otherwise. For a flagrant example see *Sacher* v. *United States*, 343 U.S. 1.

2. *State ex rel. Ashbaugh* v. *Circuit Court*, 97 Wis. 1, 8, 72 N.W. 193, 194-195.

are now easily evaded by the ever-ready and boundless expedients of a judicial decree and a summary contempt proceeding.

I would reject those precedents which have held that the federal courts can punish an alleged violation outside the courtroom of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do.[3] I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for "all criminal prosecutions." I am convinced that the previous cases to the contrary are wrong—wholly wrong for reasons which I shall set out in this opinion.

Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See, *e. g.*, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Graves* v. *New York ex rel. O'Keefe*, 306

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3. The precedents are adequately collected in note 14 of the Court's opinion.

Much of what is said in this opinion is equally applicable to contempts committed in the presence of the court. My opposition to summary punishment for those contempts was fully set forth in my dissent in *Sacher* v. *United States*, 343 U. S. 1, 14.

U. S. 466; *Nye* v. *United States*, 313 U. S. 33.[4] Indeed the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (Brandeis, J., dissenting); Douglas, Stare Decisis, 49 Col. L. Rev. 735.

If ever a group of cases called for reappraisal it seems to me that those approving summary trial of charges of criminal contempt are the ones. The early precedents which laid the groundwork for this line of authorities were decided before the actual history of the procedures used to punish contempt was brought to light, at a time when "[w]holly unfounded assumptions about 'immemorial usage' acquired a factitious authority and were made the basis of legal decisions."[5] These cases erroneously

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4. "I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." Chief Justice Taney, *Passenger Cases*, 7 How. 283, 470 (dissenting opinion).

5. Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1011.

It also seems significant that the initial decisions by this Court actually upholding the power of the federal courts to punish contempts by summary process were not made until as late as the final decades of the last century, almost a full century after the adoption of the Constitution. Since that time the power has been vigorously challenged on a number of occasions. See, *e. g.*, *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425 (dissenting opinion); *Sacher* v. *United States*, 343 U. S. 1, 14 (dissenting opinion). Within the past few years there has been a tendency on the part of this Court to restrict the substantive scope of the

assumed that courts had always possessed the power to punish all contempts summarily and that it inhered in their very being without supporting their suppositions by authority or reason. Later cases merely cite the earlier ones in a progressive cumulation while uncritically repeating their assumptions about "immemorial usage" and "inherent necessity."[6]

No justified expectations would be destroyed by the course I propose. There has been no heavy investment in reliance on the earlier cases; they do not remotely lay down rules to guide men in their commercial or property affairs. Instead they concern the manner in which persons are to be tried by the Government for their alleged crimes. Certainly in this area there is no excuse for the perpetuation of past errors, particularly errors of great continuing importance with ominous potentialities. Apparently even the majority recognizes the need for some kind of reform by engrafting the requirement that punishment for contempt must be "reasonable"—that irrepressible, vague and delusive standard which at times threatens to engulf the entire law, including the Constitution itself, in a sea of judicial discretion.[7] But this trifling amel-

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contempt power to narrower bounds than had been formerly thought to exist. See, *e. g.*, *Nye* v. *United States*, 313 U. S. 33; *Bridges* v. *California*, 314 U. S. 252; *In re Michael*, 326 U. S. 224; *Caminer* v. *United States*, 350 U. S. 399. *Cf. In re Oliver*, 333 U. S. 257. In substantial part this is attributable to a deeply felt antipathy toward the arbitrary procedures now used to punish contempts.

6. Perhaps the classic example is the much criticized decision in *In re Debs*, 158 U. S. 564. For some of the milder comment see Lewis, A Protest Against Administering Criminal Law by Injunction—The Debs Case, 42 Am. L. Reg. 879; Lewis, Strikes and Courts of Equity, 46 Am. L. Reg. 1; Dunbar, Government by Injunction, 13 L. Q. Rev. 347; Gregory, Government by Injunction, 11 Harv. L. Rev. 487.

7. *E. g.*, see *Beauharnais* v. *Illinois*, 343 U. S. 250; *Perez* v. *Brownell*, *ante*, p. 44.

ioration does not strike at the heart of the problem and can easily come to nothing, as the majority's very approval of the grossly disproportionate sentences imposed on these defendants portends.

Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. See *United States* v. *United Mine Workers of America*, 330 U. S. 258, 330-332 (dissenting and concurring opinion). Instead, at stake here is the validity of a criminal conviction for disobedience of a court order punished by a long, fixed term of imprisonment. In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically as well as historically, in determining the permissible mode of trial under the Constitution.

Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in "judgment" on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to con-

centrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence. Indeed if any other officer were presumptuous enough to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused.[8] He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objec-

8. A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt. See, e. g., *Fisher* v. *Pace*, 336 U. S. 155; *Sacher* v. *United States*, 343 U. S. 1; *Offutt* v. *United States*, 348 U. S. 11; *Nilva* v. *United States*, 352 U. S. 385; *Yates* v. *United States*, 355 U. S. 66.

tive, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison*, 349 U. S. 133, 136-137. Cf. *Chambers* v. *Florida*, 309 U. S. 227, 236-237; *Tumey* v. *Ohio*, 273 U. S. 510; *In re Oliver*, 333 U. S. 257.

The vices of a summary trial are only aggravated by the fact that the judge's power to punish criminal contempt is exercised without effective external restraint. First, the substantive scope of the offense of contempt is inordinately sweeping and vague; it has been defined, for example, as "any conduct that tends to bring the authority and administration of the law into disrespect or disregard."[9] It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law. Secondly, a defendant's principal assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that "the trial judge has not abused his dis-

9. Oswald, Contempt of Court (3d ed. 1911), 6.

cretion." But even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge. Finally, as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of "reasonableness" now promulgated by the majority.

In my view the power of courts to punish criminal contempt by summary trial, as now exercised, is precisely the kind of arbitrary and dangerous power which our forefathers both here and abroad fought so long, so bitterly, to stamp out. And the paradox of it all is that the courts were established and are maintained to provide impartial tribunals of strictly disinterested arbiters to resolve charges of wrongdoing between citizen and citizen or citizen and state.

The Constitution and Bill of Rights declare in sweeping unequivocal terms that "The Trial of all Crimes . . . shall be by Jury," that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." As it may now be punished criminal contempt is manifestly a crime by every relevant test of reason or history. It was always a crime at common law punishable as such in the regular course of the criminal law.[10] It possesses all of the earmarks commonly attributed to a crime. A mandate of the Government has

10. See pp. A12-A23, *infra*.

allegedly been violated for which severe punishment, including long prison sentences, may be exacted—punishment aimed at chastising the violator for his disobedience.[11] As Mr. Justice Holmes irrefutably observed for the Court in *Gompers* v. *United States*, 233 U. S. 604, at 610-611: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way."[12]

This very case forcefully illustrates the point. After surrendering the defendants were charged with fleeing

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11. In accordance with established usage 18 U. S. C. § 1 defines a felony as any "offense punishable by death or imprisonment for a term exceeding one year." By this standard the offense of contempt is not only a crime, but a felony—a crime of the gravest and most serious kind.

Of course if the maximum punishment for criminal contempt were sufficiently limited that offense might no longer fall within the category of "crimes"; instead it might then be regarded, in the light of our previous decisions, as a "petty" or "minor" offense for which the defendant would not necessarily be entitled to trial by jury. See *District of Columbia* v. *Clawans*, 300 U. S. 617; *Callan* v. *Wilson*, 127 U. S. 540.

12. Cf. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392 ("Contempt of court is a specific criminal offence."). And see *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66-67; *Pendergast* v. *United States*, 317 U. S. 412, 417-418.

"Since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to an accused in a criminal trial should be extended to prosecutions for such contempt." Frankfurter and Greene, The Labor Injunction, 226.

from justice, convicted, and given lengthy prison sentences designed to punish them for their flight. Identical flight has now been made a statutory crime by the Congress with severe penalties.[13] How can it possibly be any more of a crime to be convicted of disobeying a statute and sent to jail for three years than to be found guilty of violating a judicial decree forbidding precisely the same conduct and imprisoned for the same term?

The claim has frequently been advanced that courts have exercised the power to try all criminal contempts summarily since time immemorial and that this mode of trial was so well established and so favorably regarded at the time the Constitution was adopted that it was carried forward intact, by implication, despite the express provisions of the Bill of Rights requiring a completely different and fairer kind of trial for "all crimes." The myth of immemorial usage has been exploded by recent scholarship as a mere fiction. Instead it seems clear that until at least the late Seventeenth or early Eighteenth Century the English courts, with the sole exception of the extraordinary and ill-famed Court of Star Chamber whose arbitrary procedures and gross excesses brought forth many of the safeguards included in our Constitution, neither had nor claimed power to punish contempts committed out of court by summary process. Fox, The History of Contempt of Court; Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042-1052; Beale, Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161. Prior to this period such contempts were tried in the normal and regular course of the criminal law, including trial by jury.[14] After the Star Chamber was abolished

13. 18 U. S. C. § 3146.

14. One scholar has argued that even contempts in the face of the courts were tried by jury after indictment by grand jury

in 1641 the summary contempt procedures utilized by that odious instrument of tyranny slowly began to seep into the common-law courts where they were embraced by judges not averse to enhancing their own power. Still for decades the instances where such irregular procedures were actually applied remained few and far between and limited to certain special situations.

Then in 1765 Justice Wilmot declared in an opinion prepared for delivery in the Court of King's Bench (but never actually handed down) that courts had exercised the power to try all contempts summarily since their creation in the forgotten past. Although this bald assertion has been wholly discredited by the painstaking research of the eminent authorities referred to above, and even though Wilmot's opinion was not published until some years after our Constitution had been adopted, nor cited as authority by any court until 1821, his views have nevertheless exerted a baleful influence on the law of contempt both in this country and in England. By the middle of the last century the English courts had come to accept fully his thesis that they inherently possessed power to punish all contempts summarily, in or out of court. Yet even then contempts were often punished by the regular criminal procedures so that this Court could report as late as 1913 that they were still preferably tried in that manner. *Gompers* v. *United States*, 233 U. S. 604, 611.[15]

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until the reign of Elizabeth I. Solly-Flood, Prince Henry of Monmouth and Chief Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47. Although agreeing that contempts *in facie* were often tried by a jury up to and beyond this period, Fox takes the view that such contempts were also punishable by summary procedures from the early common law.

15. In passing it is interesting to note that even Wilmot felt obliged to bolster his position by pointing to the fact that a de-

The Government, relying solely on certain obscure passages in some early law review articles by Fox, contends that while the common-law courts may not have traditionally possessed power to punish all criminal contempts without a regular trial they had always exercised such authority with respect to disobedience of their decrees. I do not believe that the studies of Fox or of other students of the history of contempt support any such claim. As I understand him, Fox reaches precisely the opposite conclusion. In his authoritative treatise, expressly written to elaborate and further substantiate the opinions formed in his earlier law review comments, he states clearly at the outset:

> "The first of [this series of earlier articles], entitled *The King* v. *Almon*, was written to show that in former times the offence of contempt committed out of court was tried by a jury in the ordinary course of law and not summarily by the Court as at present [1927]. The later articles also bear upon the history of the procedure in matters of contempt. Further inquiry confirmed the opinion originally formed with regard to the trial of contempt and brought to light a considerable amount of additional evidence which, with the earlier matter, is embodied in the following chapters. . . ."[16]

Then in summarizing he asserts that strangers to court proceedings were never punished except by the ordinary processes of the criminal law for contempts committed out

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fendant under a notion then prevalent, could exonerate himself from a charge of contempt by fully denying the charges under oath. In this event he could only be prosecuted for false swearing in which case he was entitled, as Wilmot elaborately observes, to trial by jury. See Curtis and Curtis, The Story of a Notion in the Law of Criminal Contempt, 41 Harv. L. Rev. 51.

16. Fox, The History of Contempt of Court, VII.

of the court's presence until some time after the dissolution of the Star Chamber; he immediately follows with the judgment that parties were governed by the same general rules that applied to strangers.[17] Of course he recognizes the antiquity of the jurisdiction of courts to enforce their orders by conditional confinement, but such coercion, as pointed out before, is obviously something quite different from the infliction of purely punitive penalties for criminal contempt when compliance is no longer possible.

Professors Frankfurter and Landis in their fine article likewise unequivocally declare:

> ". . . the Clayton Act [providing for jury trial of certain charges of criminal contempt] does nothing new. It is as old as the best traditions of the common law. . . .
>
> "Down to the early part of the eighteenth century cases of contempt even in and about the common-law courts when not committed by persons officially connected with the court were dealt with by the ordinary course of law, *i. e.*, tried by jury, except when the offender confessed or when the offense was committed 'in the actual view of the court.' . . .
>
> . . . . . .
>
> "[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process."[18]

And Professor Beale in his discussion of the matter concludes:

> "As early as the time of Richard III it was said that the chancellor of England compels a party against

17. *Id.*, at 116-117. See also, *id.*, at 3-4, 13, 54-55, 71-72, 89.

18. Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042, 1046.

whom an order is issued by imprisonment; and a little later it was said in the chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey, and that is all the chancellor can do.' This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century [Beale was writing in 1908] it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. . . . In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; . . . .

. . . . . .

"Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required."[19]

In brief the available historical material as reported and analyzed by the recognized authorities in this field squarely refutes the Government's insistence that disobedience of a court order has always been an exception punishable by summary process. Insofar as this particular case is concerned, the Government frankly concedes that it cannot point to a single instance in the entire course of Anglo-American legal history prior to this prosecution and two related contemporary cases where a defendant has been punished for criminal contempt by summary trial after fleeing from court-ordered imprisonment.[20]

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19. Contempt of Court, Criminal and Civil, 21 Harv. L. Rev. 161, 169-170, 174.

20. See *United States* v. *Thompson*, 214 F. 2d 545; *United States* v. *Hall*, 198 F. 2d 726.

Those who claim that the delegates who ratified the Constitution and its contemporaneous Amendments intended to exempt the crime of contempt from the procedural safeguards expressly established by those great charters for the trial of "all crimes" carry a heavy burden indeed. There is nothing in the Constitution or any of its Amendments which even remotely suggests such an exception. And as the Government points out in its brief, it does not appear that there was a word of discussion in the Constitutional Convention or in any of the state ratifying conventions recognizing or affirming the jurisdiction of courts to punish this crime by summary process, a power which in all particulars is so inherently alien to the method of punishing other public offenses provided by the Constitution.

In the beginning the contempt power with its essentially arbitrary procedures was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom and maintain the authority of the courts.[21] But since the adoption of the Constitution it has undergone an incredible transformation and growth, slowly at first and then with increasing acceleration, until it has become a powerful and pervasive device for enforcement of the criminal law. It is no longer the same comparatively innocuous power that it was. Its summary procedures have been pressed into service for

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21. Although records of the colonial era are extremely fragmentary and inaccessible apparently such contempts as existed were not the subject of major punishment in that period. From the scattered reported cases it appears that alleged offenders were let off after an apology, a reprimand or a small fine or other relatively slight punishment. I have found no instance where anyone was unconditionally imprisoned for even a term of months, let alone years, during that era when extremely harsh penalties were otherwise commonplace.

such far-flung purposes as to prevent "unlawful" labor practices, to enforce the prohibition laws, to secure civil liberties and now, for the first time in our history, to punish a convict for fleeing from imprisonment.[22] In brief it has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs. But still worse, its subversive potential to that end appears to be virtually unlimited. All the while the sentences imposed on those found guilty of contempt have steadily mounted, until now they are even imprisoned for years.

I cannot help but believe that this arbitrary power to punish by summary process, as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created—principles which were uppermost in the minds of the generation that adopted the Constitution. Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state. A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the Fifth,

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22. The following are merely random samples of important and far-reaching federal regulatory Acts now in effect under which a violation of any provision of the Act is not only a statutory crime punishable as such but also may be enjoined at the Government's request and punished as a criminal contempt by summary process if the injunction is disobeyed. Securities Exchange Act, 48 Stat. 900, 15 U. S. C. § 78u; Natural Gas Act, 52 Stat. 832, 15 U. S. C. § 717s; Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. § 217; Atomic Energy Act, 68 Stat. 959, 42 U. S. C. (Supp. IV) § 2280; Federal Communications Act, 48 Stat. 1092, 47 U. S. C. § 401; Defense Production Act of 1950, 64 Stat. 817, 50 U. S. C. App. § 2156.

Sixth, Seventh and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges, especially with regard to the procedures used for the trial of crimes.

As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men.[23] Witness the fierce opposition of the colonials to the courts of admiralty in which judges instead of citizen juries were authorized to try those charged with violating certain laws.[24] The same zealous determination to protect jury trial dominated the state conventions which ratified the Constitution and eventually led to the solemn reaffirmation of that mode of trial in the Bill of Rights—not only for all criminal prosecutions but for all civil causes involving $20 or more. See 2 Story, Commentaries on the Constitution (5th ed. 1891), §§ 1763-1768. I find it difficult to understand how it can be maintained that the same people who manifested such great concern for trial by jury as to explicitly embed it in the Constitution for every $20 civil suit could have intended that this cherished method of trial should not be available to those threatened with long imprisonment for the crime of contempt. I am confi-

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23. As early as 1765 delegates from nine colonies meeting in New York declared in a Declaration of Rights that trial by jury was the "inherent and invaluable right" of every colonial. 43 Harvard Classics 147, 148.

24. In 1775 Jefferson protested: "[Parliament has] extended the jurisdiction of the courts of admiralty beyond their ancient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the decision arbitrary decision [*sic*] of a single and dependent judge." 2 Journals of the Continental Congress (Ford ed.) 132.

dent that if there had been any inkling that the federal courts established under the Constitution could impose heavy penalties, as they now do, for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest, to put it mildly. Would any friend of the Constitution have been foolhardy enough to take the floor of the ratifying convention in Virginia or any of a half dozen other States and even suggest such a possibility?[25]

As this Court has often observed, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning," *United States* v. *Sprague*, 282 U. S. 716, 731; ". . . constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption," *Lake County* v. *Rollins*, 130 U. S. 662, 671. Cf. Mr. Justice Holmes in *Eisner* v. *Macomber*, 252 U. S. 189, 219-220 (dissenting opinion). It is wholly beyond my comprehension how the generality of laymen, or for that matter even thoughtful lawyers, either at the end of the Eighteenth

25. Although Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, authorized the federal courts to punish contempts "in any cause or hearing before the same," it did not, as this Court has pointed out, define what were contempts or prescribe the method of punishing them. *Savin, Petitioner*, 131 U. S. 267, 275. Section 17, which contains a number of other provisions, appears to have been a comparatively insignificant provision of the judicial code enacted by the Congress without material discussion in the midst of 34 other sections, many of which were both extremely important and highly controversial.

Century or today, could possibly see an appreciable difference between the crime of contempt, at least as it has now evolved, and other major crimes, or why they would wish to draw any distinction between the two so far as basic constitutional rights were concerned.

It is true that Blackstone in his Commentaries incorporated Wilmot's erroneous fancy that at common law the courts had immemorially punished all criminal contempts without regular trial. Much ado is made over this by the proponents of summary proceedings. Yet at the very same time Blackstone openly classified and uniformly referred to contempt as a "crime" throughout his treatise, as in fact it had traditionally been regarded and punished at common law.[26] Similarly, other legal treatises available in this country during the period when the Constitution was established plainly treated contempt as a "crime."[27] It seems to me that if any guide to the meaning of the Constitution can be fashioned from the circulation of the Commentaries and these other legal authorities through the former colonies (primarily among lawyers and judges) it is at least as compatible with the view that the Constitution requires a jury trial for criminal contempts as with the contrary notion.

But far more significant, our Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive govern-

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26. See, *e. g.*, 4 Blackstone's Commentaries 1-6, 119-126, 280-287. Also pertinent here is Blackstone's oft-quoted laudation of trial by jury "as the glory of the English law. . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 *id.*, at 379.

27. See, *e. g.*, 1 Hawkins, Pleas of the Crown (6th ed. 1787), 87.

mental practice then tolerated, or thought to be, in England. Cf. *Bridges* v. *California*, 314 U. S. 252, 263-268. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified. As summarized by one historian:

> "The Revolutionary War made everything connected with the law of England distasteful to the people at large. The lawyers knew its value: the community did not. Public sentiment favored an American law for America. It was quickened by the unfriendly feeling toward the mother country which became pronounced toward the close of the eighteenth century and culminated in the War of 1812."[28]

Although the bench and bar, particularly those who were adherents to the principles of the Federalist Party, often favored carrying forward the common law to the fullest possible extent popular sentiment was overwhelmingly against them.[29]

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28. Baldwin, The American Judiciary, 14.

"After the Revolution the public was extremely hostile to England and to all that was English and it was impossible for the common law to escape the odium of its English origin." Pound, The Spirit of the Common Law, 116. And see Warren, History of the American Bar, 224-228.

29. In 1804 the Chief Justice and two Associate Justices of the Pennsylvania Supreme Court were actually impeached for sentencing a person to jail for contempt. In part the impeachment

Apologists for summary trial of the crime of contempt also endeavor to justify it as a "necessity" if judicial orders are to be observed and the needful authority of the courts maintained. "Necessity" is often used in this context as convenient or desirable. But since we are dealing with an asserted power which derogates from and is fundamentally inconsistent with our ordinary, constitutionally prescribed methods of proceeding in criminal cases, "necessity," if it can justify at all, must at least refer to a situation where the extraordinary power to punish by summary process is clearly indispensable to the enforcement of court decrees and the orderly administration of justice. Or as this Court has repeatedly phrased it, the courts in punishing contempts should be rigorously restricted to the "least possible power adequate to the end proposed." See, *e. g., In re Michael*, 326 U. S. 224, 227.

Stark necessity is an impressive and often compelling thing, but unfortunately it has all too often been claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. As one of our great lawyers, Edward Livingston, observed in proposing the complete abolition of summary trial of criminal contempts:

> "Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation."[30]

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rested on the feeling that punishment of contempt by summary process was an arbitrary practice of the common law unsuited to this country. While the Justices were narrowly acquitted this apparently only aggravated popular antagonism toward the contempt power. See 3 McMaster, History of the People of the United States (1938 ed.), 153-162.

30. 1 Works of Edward Livingston 264.

When examined in closer detail the argument from "necessity" appears to rest on the assumption that the regular criminal processes, including trial by petit jury and indictment by grand jury, will not result in conviction and punishment of a fair share of those guilty of violating court orders, are unduly slow and cumbersome, and by intervening between the court and punishment for those who disobey its mandate somehow detract from its dignity and prestige. Obviously this argument reflects substantial disrespect for the institution of trial by jury, although this method of trial is—and has been for centuries—an integral and highly esteemed part of our system of criminal justice enshrined in the Constitution itself. Nothing concrete is ever offered to support the innuendo that juries will not convict the same proportion of those guilty of contempt as would judges. Such evidence as is available plus my own experience convinces me that by and large juries are fully as responsible in meting out justice in criminal cases as are the judiciary.[31] At the same time, and immeasurably more important, trial before a jury and in full compliance with all of the other protections of the Bill of Rights is much less likely to result in a miscarriage of justice than summary trial by the same judge who issued the order allegedly violated.

Although some are prone to overlook it, an accused's right to trial by a jury of his fellow citizens when charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country.[32] In the words of Chief Justice Cooley: "The

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31. See, e. g., Sunderland, Trial by Jury, 11 Univ. of Cin. L. Rev. 119, 120; Hartshorne, Jury Verdicts: A Study of Their Characteristics and Trends, 35 A. B. A. J. 113.

32. See *Ex parte Milligan*, 4 Wall. 2, 122-123; *Thompson* v. *Utah*, 170 U. S. 343, 349-350; *Dimick* v. *Schiedt*, 293 U. S. 474, 485-486; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16.

law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice." *People* v. *Garbutt*, 17 Mich. 9, 27. Trial by an impartial jury of independent laymen raises another imposing barrier to oppression by government officers. As one of the more perceptive students of our experiment in freedom keenly observed, "The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government." 1 De Tocqueville, Democracy in America (Reeve trans., 1948 ed.), 282. The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens.

It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning

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18-19; The Federalist, No. 83 (Hamilton); 2 Story, Commentaries on the Constitution of the United States, 544; 2 Wilson's Works (Andrews ed. 1896) 222.

our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. But even setting this dominant consideration to one side, what compelling necessity is there for special dispatch in *punishing* criminal contempts, especially those occurring beyond the courtroom? When the desired action or inaction can no longer be compelled by coercive measures and all that remains is the punishment of past sins there is adequate time to give defendants the full benefit of the ordinary criminal procedures. As a matter of fact any slight delay involved might well discourage a court from resorting to hasty, unnecessary measures to chastise suspected disobedience. I believe that Mr. Justice Holmes, speaking for himself and Mr. Justice Brandeis, took his stand on invulnerable ground when he declared that where "there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-426 (dissenting opinion).[33]

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33. Again this case aptly demonstrates the point. Here the defendants surrendered several years after they had ordered to apear and serve their sentences. There was no reason for urgent action to punish them for their absence, there was ample time to impanel a jury and prosecute them in the regular manner. As a mattet of fact almost a month and a half did elapse between their surrender and trial.

Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held,

For almost a half century the Clayton Act has provided for trial by jury in all cases of criminal contempt where the alleged contempt is also a violation of a federal criminal statute.[34] And since 1931 the Norris-LaGuardia Act has granted the same right where a charge of criminal contempt is based on the alleged violation of an injunction issued in a labor dispute.[35] Notwithstanding the forebodings of calamity and destruction of the judicial system which preceded, accompanied and briefly followed these reforms, there is no indication whatever that trial by jury has impaired the effectiveness or authority of the courts in these important areas of the law. Furthermore it appears that in at least five States one accused of the crime of contempt is entitled, at least to some degree, to demand jury trial where the alleged contempt occurred beyond the courtroom.[36] Again, I am unable to find any evidence, or even an assertion, that judicial orders have been stripped of their efficacy, or courts deprived of their requisite dignity by the intervention of the jury in those States. So far as can be discerned the wheels of justice have not ground to a halt or even noticeably slowed. After all the English courts apparently got on with their

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witnesses must be called, and evidence taken in any event. Cf. *Cooke v. United States*, 267 U. S. 517. And often, as in this case, crucial facts are in close dispute.

I might add, at this point, that MR. JUSTICE BRENNAN has forcefully demonstrated, in my judgment, that the evidence in this case was wholly insufficient to prove a crucial element of the offense charged—namely, notice of the surrender order.

34. 38 Stat. 738-739, as amended, 18 U. S. C. §§ 402, 3691.

35. 47 Stat. 72, 18 U.S.C. § 3692.

36. Arizona, Rev. Stat. Ann., 1956, § 12-863; Georgia, Code Ann., 1935, § 24-105; Kentucky, Rev. Stat. Ann., 1955, § 432.260; Oklahoma, Stat. Ann., 1936, Tit. 21, § 567; Pennsylvania, Purdon's Stat. Ann., 1930 (Cum. Ann. Pocket Pt. 1957), Tit. 17, § 2047.

business for six or seven centuries without any general power to try charges of criminal contempt summarily.

I am confident that in the long run due respect for the courts and their mandates would be much more likely if they faithfully observed the procedures laid down by our nationally acclaimed charter of liberty, the Bill of Rights.[37] Respect and obedience in this country are not engendered—and rightly not—by arbitrary, and autocratic procedures. In the end such methods only yield real contempt for the courts and the law. The classic example of this is the use and abuse of the injunction and summary contempt power in the labor field. The federal courts have still not recovered from the scars inflicted by their intervention in that area where Congress finally stepped in and preserved the right of jury trial to all those charged with the crime of contempt.

In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is con-

37. See Brown, Whence Come These Sinews? 12 Wyo. L. J. 22.

cerned. There is no valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth. In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt.

TOPICAL INDEX

Index to Authorities

CASES

OTHER AUTHORITIES